Nos. 96-330, 96-742

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In the Supreme Court of the United States

OCTOBER TERM, 1996

OFFICIAL COMMITTEE OF TORT CLAIMANTS, et al.,
Petitioners,
v.
DOW CORNING CORPORATION, et al., *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR DOW CORNING CORPORATION, THE DOW CHEMICAL COMPANY AND CORNING INCORPORATED IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether this Court should review the Sixth Circuit's ruling on the motion to transfer when no cases have yet been transferred and the district court's second denial of transfer is currently the subject of another appeal now pending in the Sixth Circuit.

2. Whether litigation against non-debtors is "related to" a bankruptcy only when a judgment against the defendant in that litigation would result in the automatic creation of contribution or indemnity liability against the debtor.

3. Whether district courts, in exercising the power to fix trial venue provided in 28 U.S.C. § 157(b)(5), may transfer, to the district where a bankruptcy is pending, cases related to the bankruptcy.

RULE 29.6 STATEMENT

The Dow Chemical Company and Corning Incorporated each own 50% of Dow Corning Corporation. The following is a list of nonwholly owned subsidiaries of Dow Corning Corporation:

Devonshire Underwriters Limited
Dow Corning de Argentina S.A.I.C.
Dow Corning de Brazil LTDA
Dow Corning de Colombia, S.A.
Dow Corning de Mexico S.A. de C.V.
Dow Corning de Venezuala S.A.
Dow Corning Chile S.A.
Dow Corning Taiwan Inc.
Dow Corning Thailand Ltd.
Dow Corning Construction S.A.
DC STI S.A.
Dow Corning France S.A.
Dow Corning Investment S.A.
Dow Corning Coordination Center S.A.
Dow Corning Limited
Dow Corning S.A.
Dow Corning STI Limited
DC Krafft S.A.

The Dow Chemical Company has no parent company. The following is a list of nonwholly owned subsidiaries of The Dow Chemical Company:

Destec Energy, Inc.

Corning Incorporated has no parent company. The following is a list of nonwholly owned subsidiaries of Corning Incorporated:

Corning Incorporated Foreign Sales Corporation
Corning France, S.A.
Corning Japan K.K.

Corning Asahi Corporation
Corning Asahi Video Products Company
Iwaki Corning (M) SDN BHD
Dominique Dutscher, S.A.
Siecor Corporation
Siecor Mexico S.A. de C.V.
Siecor S.A. de C.V.
Associated Clinical Laboratories L.P.
CORNING SciCor Limited Partnership
CORNING Bio Inc.
Pathology Building Partnership
CALP S.p.A.
EuroKera S.N.C.
Keraglass
Morgane S.A.
Samcor Glass Limited
Sicover, S.A.
Siecor GmbH
Siecor GmbH & Co. KG
International Hau-Mei Glass Engineering Co., Ltd.
Optical Waveguides Australia Pty. Ltd.
Pittsburgh Corning Europe N.V.
Pittsburgh Corning (U.K.) Ltd.
Shanghai Corning Engineering Corporation Ltd.
Optical Fibres
Samsung-Corning Co., Ltd.
Samsung Corning Company (Malaysia) SDN BHD
N-Cor, Ltd.
ACOR Programs, Inc.
CeraMem Separations, Inc.
Cormetech, Inc.
American Video Glass Company
Watkins Glen International, Inc.
Corporate Venture Partners
Samsung Corning Precision Glass Co., Ltd.
Corsam Glasstec R&D Center

Doan Associates
Eurokera North America, Inc.
Fairfield Venture Partners II, L.P.
Fiber Sensys, Inc.
Molecular Simulations, Inc.
MDL Information Systems, Inc.
Pittsburgh Corning Corporation
U.S. Conec, Ltd.
Steuben Partners, L.P.
Surgical Eye Enterprises L.P.
Surgical Eye Institute L.P.
Clinical Pathology Institute
Nevillewood L.P.
Pharmakon Research & Development
Hazleton Clinical Research Institute Inc.
Bio-Imaging Technologies, Inc.
Quanterra Incorporated
Home Access Health Corp.

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BRIEF FOR DOW CORNING CORPORATION, THE DOW CHEMICAL COMPANY, AND CORNING INCORPORATED IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-28a[1]) is reported at 86 F.3d 482. The opinions of the district court (Pet. App. 29a-56a and 57a-64a) are reported at 187 B.R. 919 and 187 B.R. 934 respectively.

JURISDICTION

The judgment of the court of appeals was entered on April 9, 1996. The petitions for rehearing were denied on June 3, 1996. Pet. App. 65a. The petitions for writ of certiorari were filed on August 28, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

A. Background.

Dow Corning Corporation ("Dow Corning" or "the debtor") is a leading manufacturer of silicone industrial products. Along with its subsidiaries, Dow Corning sells more than 8,700 products, nearly all of which are made from silicones or otherwise incorporate silicone technologies. C.A. App. 3033. In 1991, the peak year for sales of Dow Corning's breast implant products, silicone gel breast implants constituted less than 1% of Dow Corning's total sales. *Ibid.*

Studies by disinterested scientists have consistently found no connection between silicones and disease. See Marcia

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[1] References in this brief to "Pet." and "Pet. App." are to the Petition and attached Appendices filed by the Official Committee of Tort Claimants in No. 96-330. The petition filed in No. 96-742 is cited as "O'Quinn Pet."

Angell, *Science on Trial: The Clash of Medical Evidence and the Law in the Breast Implant Case* 195-197 (1996) ("several good epidemiologic studies have failed to show an association between implants and a host of connective tissue diseases, symptoms, and abnormal lab tests. * * * The best evidence now is a relative risk of 1.0, indicating no contribution of implants to disease").[2] Nonetheless, tens of thousands of recipients of Dow Corning's breast implants have sued in recent years, claiming to have contracted various diseases as a result of the silicones in their implants. Pet. App. 3a.

In thousands of these cases, the plaintiffs have sued not only Dow Corning, but also its corporate parents, The Dow Chemical Company ("Dow Chemical") and Corning Incorporated ("Corning") (collectively the "Shareholders"), even though neither Dow Chemical nor Corning designed, manufactured, tested, or sold breast implants. *Id.* at 4a-5a. The Shareholders, in turn, have each asserted cross-claims against Dow Corning for indemnity and contribution. *Id.* at 13a; C.A. App. 2028, 2135-2140. All of the claims against

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[2] Dr. Angell is executive editor of *The New England Journal of Medicine*. See also, *e.g.*, J. Sanchez-Guerrero, et al., *Silicone Breast Implants and the Risk of Connective-Tissue Diseases and Symptoms*, 332 NEW ENG. J. MED. 1666, 1670 (1995) (Harvard Medical School study concluding that "we found no evidence of an association between silicone breast implants and either connective-tissue diseases defined according to a variety of standardized criteria or signs or symptoms of connective-tissue disease"). Petitioners' allegations about the testing and safety of silicones (Pet. 4-5) are wildly inaccurate and inconsistent with all of the responsible scientific studies performed in recent years. See generally *Artiglio v. Corning Inc.*, 56 Cal. Rptr. 2d 877 (App. 1996) (describing tests on silicone compounds and holding that there is no basis to impose liability on Dow Chemical or Corning).

the Shareholders are brought by plaintiffs who are also asserting the same claims against the debtor, seeking recovery for the same alleged injuries resulting from the same products — the debtor's implants. C.A. App. 2027-2133, 3035-3036, 3049-3050. Thus, all of the cases against the debtor and its Shareholders raise the same threshold issue — do Dow Corning's implants cause disease, as the tort claimants assert? [3] C.A. App. 107, 2028, 2032-2133. Throughout this litigation, Dow Corning and its Shareholders have suggested that the federal courts keep open the option of eventually holding a single trial to resolve this common, potentially dispositive, question. *E.g.*, C.A. App. 198-206, 1181-1193, 1203-1207, 1215-1216.

B. Dow Corning's Shared Insurance With Dow Chemical And Corning.

For many years, Dow Corning shared insurance coverage with Dow Chemical and Corning under a substantial number of liability insurance policies. As the court of appeals noted, Dow Corning's interest in these policies and their proceeds constitutes "one of the largest assets of [the] bankruptcy estate"; the policies have total aggregate coverage limits of more than $1 billion. Pet. App. 21a.

The court of appeals held — and petitioners do not contest in this Court — that if the claims against Dow Chemical and Corning proceed "separate[ly]," the debtor's "insurance coverage may be eviscerated when the proceeds are eventually distributed." Pet. App. 23a. This could occur because settlements or judgments paid by the Shareholders, or defense expenses incurred by the Shareholders, are reim-

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[3] Some cases include claims that implants have ruptured or leaked, but those cases also allege uniformly that the implants cause disease.

bursed by joint insurance proceeds that would otherwise be part of the debtor's estate. *Id.* at 22a-23a.

C. The Proceedings Below.

Shortly after its Chapter 11 filing, Dow Corning moved under 28 U.S.C. § 157(b)(5) to transfer to the Eastern District of Michigan, where its bankruptcy case is pending, all pending breast implant claims involving Dow Corning implants — that is, all of the claims against Dow Corning and its Shareholders. Dow Chemical and Corning joined in that motion. Pet. App. 4a-5a. The motion to transfer covered claims that were in federal court under diversity jurisdiction, as well as claims that had been, or were in the process of being, removed from state courts pursuant to the bankruptcy removal statute, 28 U.S.C. § 1452(a). *Ibid.*

In September 1995, the district court granted the transfer motion as to the claims against the debtor, but refused to transfer the claims against the Shareholders, ruling that the latter claims were not "related to" the debtor's bankruptcy case. Pet. App. 29a; see 28 U.S.C. § 1334(b) ("the district courts shall have original but not exclusive jurisdiction of all civil proceedings * * * related to cases under title 11"). In so ruling, the district court expressly noted that

> one or more causation trials held during the estimation process for the purpose of assuring a more accurate estimation can best be accomplished if all cases pending against the Debtor are before one court, the district court where the bankruptcy is pending.

Pet. App. 47a. The court indicated that it would remain open to the possibility of having a common issues trial at some point in the future, *id.* at 48a, 53a-54a, and in the meantime, transferred the claims against the debtor to Judge Pointer in the Northern District of Alabama for consolidated

pretrial proceedings, subject to the Bankruptcy Code's automatic stay. *Id.* at 47a. Pursuant to an order of the Multidistrict Litigation Panel, Judge Pointer has been overseeing all of the federal breast implant cases since 1992, including claims against the debtor and its Shareholders. *In re Silicone Gel Breast Implants Prods. Liab. Litig. (MDL 926)*, 793 F. Supp. 1098 (J.P.M.L. 1992).

The Sixth Circuit reversed the district court's refusal to transfer the claims against the Shareholders. First, the court held that contribution or indemnity claims that may be brought against the debtor were "contingent claims against Dow Corning" that "obviously would affect the size of the estate and the length of time the bankruptcy proceedings will be pending, as well as Dow Corning's ability to resolve its liabilities and proceed with reorganization." Pet. App. 20a.

Second, the court of appeals gave an "additional" reason for finding "related to" jurisdiction under § 1334(b) with respect to the claims against the Shareholders. Pet. App. 21a. The court held that there was a significant risk that the Shareholders would be "able to assert mature, liquidated claims against the [joint] insurance proceeds if litigation pending against them is permitted to go forward." *Id.* at 22a, 23a. As a result, the court held that the joint insurance proceeds available to the debtor may be substantially depleted when those proceeds are ultimately distributed. *Id.* at 21a, 23a. Indeed, the court of appeals noted that

> certain of the policies cover defense expenses, and those costs alone may significantly reduce the pool of coverage available to Dow Corning if the claims pending against Dow Chemical and Corning Incorporated are allowed to proceed separately.

Id. at 23a.

The Sixth Circuit also concluded that district courts have the power, under 28 U.S.C. § 157(b)(5), to fix trial venue for claims "related to" the bankruptcy in the district where the bankruptcy is pending. *Id.* at 23a-26a. In so holding, the court followed the Fourth Circuit's decision in *A.H. Robins Co. v. Piccinin*, 788 F.2d 994 (4th Cir.), *cert. denied*, 479 U.S. 876 (1986), another mass tort case. In *Robins*, the Fourth Circuit held that claims related to a bankruptcy case could be centralized in one forum under § 157(b)(5); this provided an opportunity for adoption of a "mechanism for dispute resolution" that would obviate the need for "innumerable trials, stretching over an interminable time" and would avoid the "stupendous costs that would be involved if all the claims here had to be tried." 788 F.2d at 1013 (quoted at Pet. App. 25a-26a).

D. Subsequent Proceedings.

On remand from the Sixth Circuit's decision, the district court, in an order entered on July 30, 1996, again declined to transfer the claims against the Shareholders, this time on the ground that it would abstain from hearing those claims. Dow Corning and its Shareholders have appealed from this order. That appeal is currently pending in the Sixth Circuit. *In re Dow Corning Corp.*, Nos. 96-2005, 96-2008, 96-2009, 96-2010, 96-2011, 96-2012, 96-2013, 96-2139 (consolidated) (6th Cir.).

In the MDL case, Judge Pointer has continued to preside over a host of ongoing pretrial matters. In addition to coordinating discovery efforts and other pretrial activity, Judge Pointer has recently appointed a panel of neutral experts, pursuant to Fed. R. Evid. 706, to evaluate and critique the pertinent scientific literature and studies. *In re Silicone Gel Breast Implant Prods. Liab. Litig. (MDL 926)*, Order Nos. 31 (May 30, 1996), 31A (June 10, 1996), and 31B (June 13, 1996). (Dow Corning had previously moved

in the bankruptcy court for appointment of a Rule 706 panel. The bankruptcy judge has not yet ruled on Dow Corning's request.)

REASONS FOR DENYING THE PETITIONS

The questions presented in the petitions clearly do not warrant this Court's review. The most obvious reason is that, as a result of the district court's July 1996 order denying respondents' motion to transfer, petitioners have not been affected in any way by the Sixth Circuit's April 1996 decision that the district court had jurisdiction to entertain respondents' motion to transfer the claims against the Shareholders to the Eastern District of Michigan for trial. Unless respondents prevail in their pending Sixth Circuit appeal from the district court's most recent order, the issues raised in the petitions will be moot. And if respondents do prevail in that appeal, the questions presented here may be raised in a subsequent petition from the upcoming Sixth Circuit decision.

In any event, there is no circuit conflict on the issue whether potential contribution or indemnity claims, arising out of the debtor's acts, establish "related to" jurisdiction under 28 U.S.C. § 1334(b). The circuits agree that there is jurisdiction under § 1334(b) as long as it is *possible* that a case *may* affect the bankruptcy. Nor are the circuits divided on whether a district court has the authority, in setting trial venue under 28 U.S.C. § 157(b)(5), to transfer cases related to the bankruptcy to the district where the bankruptcy is pending for trial. Indeed, in accordance with the plain language of the statute, the circuits have uniformly upheld the power to order such transfers in appropriate cases. See, *e.g.*, *Robins*, 788 F.2d at 1010.

I. RECENT DEVELOPMENTS IN THIS CASE MAKE REVIEW COMPLETELY UNNECESSARY.

The principal point in the petitions — that this Court's review is essential so that the claims against the Shareholders are not transferred to the Eastern District of Michigan for trial — is simply inexplicable. As noted above, the district court, on July 30, 1996, again refused to transfer the claims against the Shareholders, on grounds different from those articulated before. The Sixth Circuit is currently reviewing that decision. Under these circumstances, there obviously is no need to review the earlier Sixth Circuit decision that the district court had jurisdiction to entertain the transfer motion. If the Sixth Circuit affirms the most recent decision denying transfer (or dismisses the appeal for lack of jurisdiction, as petitioners have requested), then the Sixth Circuit's earlier decision on transfer will be of academic interest only. That decision would have no impact on this case; the bottom line would be that no transfers will occur regardless of whether this Court affirmed or reversed the Sixth Circuit decision that is the subject of the current petitions for certiorari.

Alternatively, if the current Sixth Circuit appeal results in reversal of the district court's refusal to transfer, petitioners may then seek review of *that* decision, at which time they could raise the very issues they are raising now. *Virginia Military Institute v. United States*, 508 U.S. 946 (1993) (Scalia, J., respecting the denial of certiorari). If that occurs, the Court, in deciding whether to review the transfer issue at that time, would have the benefit of the Sixth Circuit's most recent views on the best way for the judiciary to manage this massive litigation.

"[M]any orders made in the progress of a suit become quite unimportant by reason of the final result, or of intervening matters." *American Constr. Co. v. Jacksonville, T. & K. W. Ry.*, 148 U.S. 372, 384 (1893). This is just such

a case. This Court has long followed the general rule that it will not grant certiorari when the courts below have not yet reached a final decision on a particular issue and later events in the case may make the issues raised in the petition moot or insignificant. *Ibid.*; see also, *e.g.*, *Brotherhood of Locomotive Firemen v. Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967) ("because the Court of Appeals remanded the case, it is not yet ripe for review by this Court"). The reasons for denying review are even stronger here. Because of intervening events in the district court, the petitioners are not harmed in any way by the decision that they challenge in the petitions. On the contrary, the current posture is that transfer has been denied, exactly the result that petitioners have requested. Under these circumstances, it would be imprudent for the Court to grant review at this juncture.

II. THE SIXTH CIRCUIT'S RULING ON "RELATED TO" JURISDICTION IS CORRECT AND DOES NOT CONFLICT WITH DECISIONS OF OTHER COURTS OF APPEALS.

The petitions for certiorari rest largely on the premise that the Sixth Circuit's decision on "related to" jurisdiction conflicts with rulings in other circuits. Pet. 12-18; O'Quinn Pet. 8-11. In fact, however, the purported conflict is illusory with respect to the issues involved in this case; the Sixth Circuit's ruling is fully consistent with decisions of other courts of appeals. While the circuits may be "split on how best to interpret this statutory language" in other contexts, *In re Fedpak Systems, Inc.*, 80 F.3d 207, 213 (7th Cir. 1996), they are not divided in any way that is relevant to this case.

1. The Sixth Circuit held that the possibility that the debtor would be held liable to non-debtors for contribution or indemnity "suffices to establish a conceivable impact on the estate in bankruptcy." Pet. App. 20a. Other courts of appeals have reached the same conclusion. See *In re G.S.F.*

Corp., 938 F.2d 1467, 1476 (1st Cir. 1991) (a "potential indemnity claim" is related to the bankruptcy because it "puts the * * * estate at risk of liability for what could be a substantial damage award"); *Home Ins. Co. v. Cooper & Cooper, Ltd.*, 889 F.2d 746, 750 (7th Cir. 1989) ("Potential liability" of non-debtors, who could assert indemnity claim against the debtor, would be "'related' to the bankruptcy" if the non-debtors filed their "contingent claims" against the estate by the bar date); see also *In re Wood*, 825 F.2d 90, 94 (5th Cir. 1987) (finding "related to" jurisdiction over suit against non-debtor where, depending on the outcome of the litigation, the debtor "may bear" all, part, or none of the judgment).

It is true, of course, that in its 1984 decision in *Pacor, Inc. v. Higgins*, 743 F.2d 984 (3d Cir. 1984), the Third Circuit stated that an action between non-debtors that could result in a contribution action against the debtor is related to the bankruptcy only if a judgment against the defendant would result in the "automatic creation of liability" against the debtor. *Id.* at 995. As the Sixth Circuit observed, however, the facts in this case are dramatically different; "there is a qualitative difference" between the "single possible claim for indemnification" at issue in *Pacor* and the "threat" to a reorganization plan that is "posed by the thousands of potential indemnification claims at issue here." Pet. App. 20a-21a.

More fundamentally, as the Sixth Circuit also noted (Pet. App. 15a), the Third Circuit no longer follows *Pacor*'s requirement of "automatic" liability. Instead, the Third Circuit now adheres to the consensus view that "a civil proceeding is related to bankruptcy" if "the outcome of that proceeding could *conceivably* have any effect on the estate." *Pacor*, 743 F.2d at 994 (emphasis omitted). In fact, the author of *Pacor* (Judge Garth) has joined in an opinion explaining that

> [a] key word in this test is "conceivable." *Certainty, or even likelihood, is not a requirement.* Bankruptcy jurisdiction will exist so long as it is *possible* that a proceeding *may* impact on "the debtor's rights, liabilities, options, or freedom of action" or the "handling and administration of the bankrupt estate."

In re Marcus Hook Development Park, Inc., 943 F.2d 261, 264 (3d Cir. 1991) (emphasis added) (citing, *inter alia*, the Sixth Circuit's decision in *In re Wolverine Radio Co.*, 930 F.2d 1132, 1143 (1991), *cert. dismissed*, 503 U.S. 978 (1992)).[4] The Third Circuit's most recent discussion of "related to" jurisdiction reaffirms the *Marcus Hook* standard. *In re Guild & Gallery Plus, Inc.*, 72 F.3d 1171, 1181 (3d Cir. 1996).

All of this is consistent with a long line of cases holding that actions involving non-debtors that *may* affect a bankruptcy are within federal jurisdiction under § 1334(b). This Court's decision in *Celotex Corp. v. Edwards*, 115 S. Ct. 1493 (1995), is but one example. In *Celotex*, the Court held that "related to" jurisdiction was established where, if suits against the debtor's sureties proceeded, the sureties (a) "'would *seek* to lift the Section 105 stay to reach Debtor's collateral,'" (b) triggering actions by debtor to preserve its rights, (c) both of which "'*could* completely destroy any chance of resolving the prolonged insurance coverage disputes,'" and (d) settlement of the insurance disputes "'*may well be* the linchpin of Debtor's formulation of a feasible

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[4] The *Wolverine Radio* court held that there was "related to" jurisdiction even though the debtor "would not be affected until and unless" the non-debtor sought indemnification. 930 F.2d at 1143. The court recognized that the non-debtors' dispute "may ultimately have no effect on the debtor." *Ibid.*

plan.'" *Id.* at 1500 (emphasis added). See also, *e.g.*, cases cited at Pet. App. 15a-17a, 22a-23a (all holding that "related to" jurisdiction exists when third-party actions *might* affect the bankruptcy estate); *Zerand-Bernal Group v. Cox*, 23 F.3d 159, 162 (7th Cir. 1994) (Posner, C.J.) (one purpose of § 1334(b) is to "force into the bankruptcy court suits to which the debtor need not be a party but which *may* affect the amount of property in the bankrupt estate") (emphasis added); *In re Cuyahoga Equip. Corp.*, 980 F.2d 110, 114 (2d Cir. 1992) ("The test for determining whether litigation has a significant connection with a pending bankruptcy proceeding is whether its outcome *might* have any '*conceivable* effect' on the bankrupt estate") (emphasis added).

In short, there is no circuit split on whether potential contribution or indemnity claims against the debtor, based on the debtor's alleged conduct, are sufficient to provide a basis for "related to" jurisdiction. To the contrary, in accordance with this Court's decision in *Celotex*, the courts of appeals recognize uniformly that such claims are related to the bankruptcy because they may affect the size of the estate, the length of time bankruptcy proceedings are pending, and the debtor's ability to finally resolve its liabilities in the reorganization process.

2. It is simply not true that the Sixth Circuit's decision is "a recipe for total paralysis" and that the cases against the Shareholders are "effectively frozen pending resolution of the * * * bankruptcy." Pet. 9, 11. Rather, in recognition of the significant impact that those claims — all based on allegedly defective Dow Corning products — could have on Dow Corning's reorganization efforts, Dow Corning is simply attempting to keep the claims against it and its Shareholders together in one federal court so that this massive litigation can be coordinated in a sensible and economical fashion. That is the only way to maximize the assets in Dow Corning's estate and optimize the chances for a successful

reorganization, while at the same time resolving Dow Corning's contingent breast implant liabilities comprehensively and equitably.

This would not, as the petitioners assert, bring the cases to a grinding halt. On the contrary, discovery and other pretrial activities can continue (and have continued) in a coordinated, coherent fashion. To be sure, keeping all of the cases against the debtor and its Shareholders together will prevent the threat of scores of simultaneous *trials*.[5] But this is likely to facilitate resolution of the cases, not impede it. A single judge in control of all of the cases could ensure an orderly scheduling of trials so that the burden of defending them — and the drain on the joint insurance — does not become overwhelming.

Even more importantly, that judge would also be in the best position to devise means of resolving, in a single proceeding, issues common to all of the cases, such as whether the debtor's implants cause disease. *E.g.*, *In re Bendectin Litig.*, 857 F.2d 290, 294, 308-317 (6th Cir. 1988) (ruling that the district court properly held a causation-only trial to determine whether Bendectin causes birth defects), *cert. denied*, 488 U.S. 1006 (1989); *Jenkins v. Raymark Industries, Inc.*, 782 F.2d 468, 473 (5th Cir. 1986) (approving the use of a consolidated trial to litigate whether the defendants' products were defective and the state of the art defense in thousands of asbestos cases). Indeed, the court of appeals stressed that its "primary goal" in this litigation is "to establish a mechanism for resolving the claims at issue in

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[5] "[M]any" cases are not "verging on trial." Pet. 11. In connection with the district court's most recent denial of transfer — now on appeal in the Sixth Circuit — petitioners identified only 14 cases with actual trial dates in the near future, none of which involves the Shareholders.

the most fair and equitable manner possible." Pet. App. 7a. Along these lines, Judge Pointer in recent months has appointed a Rule 706 panel of independent experts to assist in the resolution of scientific issues in the MDL proceeding, and the bankruptcy judge is currently considering Dow Corning's motion for appointment of a Rule 706 panel to be used as part of the bankruptcy process. There might also be a common issues trial in the Eastern District of Michigan to resolve the question whether Dow Corning's implants cause disease — an issue that the debtor *and* the Shareholders face in all of the cases against them. Other alternatives are available as well.[6]

Efforts like these not only go a long way to avoiding the dissipation of the joint insurance proceeds that might otherwise result from massive, simultaneous, and uncoordinated litigation against the debtor's Shareholders, but they preserve the opportunity to resolve *all* of the claims involving the debtor's products expeditiously, on a global basis. If, on the

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[6] For example, Judge Pointer has already granted final summary judgment in favor of Corning, *In re Silicone Gel Breast Implants Prods. Liab. Litig.*, 887 F. Supp. 1455 (N.D. Ala. 1995), and has narrowed (and pursuant to some pending motions, could further narrow) the remaining issues with respect to Dow Chemical. In addition, Judge Pointer currently has before him Dow Chemical's motion to certify for immediate appeal, under 28 U.S.C. § 1292(b), the court's ruling on Dow Chemical's motion for summary judgment. A ruling by the Eleventh Circuit in Dow Chemical's favor on the merits, in whole or in part, would, of course, resolve or, at a minimum, further streamline the litigation against Dow Chemical. As these examples illustrate, the possibility of a global resolution of the claims against the Shareholders — which otherwise threaten to drain the debtor's available insurance — and of avoiding the need for repetitive, duplicative briefing and/or trials in a series of courts is obviously enhanced if all of the cases are kept together in federal court.

other hand, the claims against the Shareholders are not transferred, thousands of cases against them will be tried separately, in virtually every jurisdiction in the country — an endeavor that will take years, cost enormous sums of money, and occupy vast blocks of judicial time. This would not only have a detrimental effect on the overwhelming majority of individual tort claimants, waiting for trials at the end of very long queues, but it could significantly delay the debtor's reorganization efforts (as well as deplete the size of the estate due to the erosion of the joint insurance).

3. The result here does not threaten the usurpation of "state judicial authority," as petitioners warn. Pet. 10. For one thing, thousands of the claims against the Shareholders will never be tried in state court even if this Court were to reverse the Sixth Circuit. There is federal jurisdiction over those claims for reasons unrelated to the bankruptcy; they are in federal court under diversity or federal question jurisdiction. C.A. App. 2032-2047, 2077-2083, 2105-2112. Well before Dow Corning's bankruptcy, these claims against the Shareholders were consolidated in front of Judge Pointer. *In re Silicone Gel Breast Implants Prods. Liab. Litig.*, 793 F. Supp. 1098 (J.P.M.L. 1992).

As for the remaining claims, to the extent that § 1334(b) means that some state court suits are subject to the bankruptcy court's "related to" jurisdiction, that is a function of the "breadth," *Celotex*, 115 S. Ct. at 1499, of the language that Congress used in drafting the statute. Courts have held consistently since the statute was passed that state court litigation can be "related to" a bankruptcy proceeding within the meaning of § 1334(b). Thus, it has long been accepted that state court actions that may affect the size of the debtor's estate — in particular, suits that may affect the debtor's insurance (see Pet. App. 22a-23a) — are within the district court's "related to" jurisdiction.

In most cases, however, the practical effect of § 1334(b) on state court litigation is minimal; in a typical bankruptcy, many state cases are never transferred to federal court because the district court abstains. 28 U.S.C. § 1334(c)(1), (2). But "related to" jurisdiction, in conjunction with the venue-fixing power of 28 U.S.C. § 157(b)(5), also provides a means for the courts, in the interest of judicial efficiency, to attempt to resolve thousands of claims affecting the debtor's estate in one forum. Pet. App. 24a-26a; *Robins*, 788 F.2d at 1010-1014. Nothing in the statutory language requires that federal courts be deprived of that flexibility when needed in unusual circumstances.

4. Petitioners' contention that contribution or indemnity claims against the debtor are "farfetched" (Pet. 18) does not provide a basis for this Court's review either. As a factual matter, petitioners are wrong; the Shareholders have *already* asserted cross-claims for indemnity and contribution against Dow Corning. See p. 2, *supra*. Moreover, because the factual predicates for those claims and the context in which they will be litigated are not yet known, the Sixth Circuit correctly concluded that "the possibility of contribution or indemnification liability in this case is far from attenuated." Pet. App. 21a. This Court does not typically review factual determinations like that. Robert L. Stern, Eugene Gressman, Stephen M. Shapiro, & Kenneth S. Geller, *Supreme Court Practice* 189 (7th ed. 1993).

III. THE SIXTH CIRCUIT'S RULING THAT THERE IS A POWER TO TRANSFER UNDER § 157(b)(5) IS CORRECT AND IS CONSISTENT WITH DECISIONS OF OTHER COURTS OF APPEALS.

The second question presented by petitioners concerns a district court's ability to transfer claims that affect a bankruptcy case: petitioners contend that district courts have *no* power to transfer *any* claims involving non-debtors under 28

U.S.C. § 157(b)(5). Pet. 19-23; O'Quinn Pet. 17-20. In other words, petitioners' theory is that even if it is indisputable that claims against third parties will have an effect on a bankruptcy case — say, by dissipating insurance proceeds that would otherwise be available to the estate — a district court would have no authority to transfer such cases to the district in which the bankruptcy was pending. Rather, a district court would have the power to transfer *only* claims asserted directly against the debtor.

1. No court has ever adopted such an extreme limitation on the power to transfer.[7] And the only other circuit to address the question whether personal injury claims "related to" a bankruptcy may be transferred under § 157(b)(5) when those claims are not against the debtor agrees with the Sixth Circuit. In *Robins*, the Fourth Circuit answered that question in the affirmative, reaching the same conclusion as that reached by the Sixth Circuit here. See 788 F.2d at 1010 (affirming an order transferring claims against non-debtors to the district in which the bankruptcy was pending; "[u]nquestionably" the district court "had the power under [§ 157(b)(5)] to fix the trial venue in its district for all the Dalkon Shield

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[7] Petitioners cite *In re United States Lines*, 128 B.R. 339 (S.D.N.Y. 1991), for the proposition that § 157(b)(5) is only "a venue-setting provision for personal injury tort cases *against the debtor*" (Pet. 19-20), but that case says nothing of the sort. It holds only that claims pending in state court could not be transferred to federal court under § 157(b)(5) — a ruling that is no longer good law, having been rejected by the Second Circuit. See *In re Pan Am. Corp.*, 16 F.3d 513, 516 (2d Cir. 1994) ("the plain language" of § 157(b)(5) "authorize[s]" the transfer of cases from state court to federal court).

cases").[8] Thus, there is no disagreement among the courts of appeals on this question of statutory construction.

2. Petitioners' argument that § 157(b)(5) is limited to claims "against the debtor" (Pet. 19) is also contrary to the plain language of the statute. The phrases "against the debtor" and "against the estate" are nowhere to be found in § 157(b)(5); rather, the statute grants district courts the authority to set the venue for trials of "personal injury tort and wrongful death claims" generally. Nor is there anything to the argument that because Congress referred *elsewhere* in § 157 to personal injury claims "against the estate," it must have intended to apply this same limiting qualification to the district court's powers under § 157(b)(5). See Pet. 20 (quoting § 157(b)(2)(B)). Quite the contrary — Congress's decision to qualify personal injury claims in one section but not in another demonstrates clearly that "Congress, *when it desired to do so*, knew how to restrict the scope of" personal injury claims. *Patterson v. Shumate*, 504 U.S. 753, 758 (1992) (emphasis added). Congress's use of a "broader phrase" in § 157(b)(5) than in § 157(b)(2)(B) "strongly suggests that it did not intend to restrict the provision in the manner that petitioner[s] contend[ ]." *Ibid.*

3. The purpose of § 157(b)(5) is to centralize claims related to the bankruptcy in one forum in order to facilitate reorganization. Pet. App. 24a; *In re Pan Am. Corp.*, 950 F.2d 839, 845 (2d Cir. 1991). As the court of appeals

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[8] Petitioners' contention that the *Robins* court did not order the transfer of claims against non-debtors (Pet. 21) is meritless. The Fourth Circuit unequivocally upheld the district court's authority to order the transfer to the Eastern District of Virginia of "*all actions related to* the Robins' Chapter 11 case now pending in any federal district court or subsequently removed," including claims against non-debtors. 788 F.2d at 998 (emphasis added).

recognized, the statute gives district courts the ability, in appropriate cases, to transfer all personal injury claims "related to" a bankruptcy because without this power, courts could not eliminate fragmented, duplicative, and wasteful litigation of "related to" claims, which would inevitably harm the reorganization process.[9] Pet. App. 24a-26a. Indeed, if the transfer of "related to" claims were not permitted, there would be little point in having courts decide whether a suit involving non-debtors was "related to" a bankruptcy case; that exercise only makes sense if a court can *do* something if the cases *are* related, like ordering a transfer.

* * *

The Sixth Circuit's refusal to deprive district courts of the flexibility to consolidate all related claims in the district in which the bankruptcy is pending is fully supported by precedent, logic, and the language of § 157(b)(5). There is no reason for this Court to grant review on the second question presented in the petitions.

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[9] Centralization is particularly important with regard to the Shareholders because, wholly apart from the effect of separate litigation on the joint insurance, the claims against the debtor and the claims against the Shareholders are the *very same claims*: they are brought by the same plaintiffs, involve the same Dow Corning products, and have the same factual issues. There is no reason to require a plaintiff seeking compensation for one injury to litigate the same issues on two fronts — as part of the bankruptcy process *and* in state court.

CONCLUSION

The petitions for certiorari should be denied.

Respectfully submitted.

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